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6 UNITED STATES DISTRICT COURT

7 DISTRICT OF NEVADA

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9 UNITED STATES OF AMERICA,

Case No. 3:17-cr-00104-LRH-CLB

10 Respondent/Plaintiff,

ORDER

11 v.

12 ANDREW DENG PHAM,

13 Petitioner/Defendant.
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15 Before the Court is petitioner Andrew Deng Pham's ("Pham") motion, to vacate, set aside,
16 or correct his sentence pursuant to 28 U.S.C. § 2255 (ECF No. 51). Pham filed his motion
17 considering the recent ruling in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). The government
18 opposes (ECF No. 53), arguing that Pham's claims are procedurally barred because he did not raise
19 them on direct appeal. In his reply (ECF No. 54), Pham maintains that the constitutional errors are
20 structural.

21 For the reasons contained within this Order, the Court denies Pham's motion and denies
22 him a certificate of appealability.

23 **I. BACKGROUND**

24 Pham has an extensive criminal history dating back to 1995. Most notably, in 2007, Pham
25 was convicted of attempted murder. After serving almost nine years for that conviction, he was
26 paroled in September of 2016.

27 The current motion relates to Pham's conduct on October 20, 2017, when West Wendover
28 Police officers responded to a report at a local casino of two men attempting to cash fraudulent

1 checks and who might be in possession of a firearm. After seeing Pham and another individual at
2 the check cashing counter, the officers approached. Upon searching Pham, the officers found a
3 loaded Glock, Model 33, .357 handgun in his waistband. Pham was still on parole for his attempted
4 homicide conviction from 2007.

5 In August 2018, per a plea agreement, Pham pleaded guilty to Unlawful Possession of a
6 Firearm by a Previously Convicted Felon. ECF No. 38. This Court sentenced Pham to 42 months'
7 imprisonment followed by three years of supervised release. ECF Nos. 45, 46. Now, Pham seeks
8 to vacate his sentence pursuant to 28 U.S.C. § 2255.

9 **II. LEGAL STANDARD**

10 Pursuant to 28 U.S.C. § 2255, a petitioner may file a motion requesting the court which
11 imposed sentence to vacate, set aside, or correct the sentence. 28 U.S.C. § 2255(a). Such a motion
12 may be brought on the following grounds: (1) "the sentence was imposed in violation of the
13 Constitution or laws of the United States;" (2) "the court was without jurisdiction to impose such
14 sentence;" (3) "the sentence was in excess of the maximum authorized by law;" or (4) the sentence
15 "is otherwise subject to collateral attack." *Id.*; see *United States v. Berry*, 624 F.3d 1031, 1038 (9th
16 Cir. 2010). When a petitioner seeks relief pursuant to a right newly recognized by a decision of
17 the United States Supreme Court, a one-year statute of limitations applies. 28 U.S.C. §
18 2255(f). That one-year limitation period begins to run from "the date on which the right asserted
19 was initially recognized by the Supreme Court." *Id.* § 2255(f)(3).

20 On June 21, 2019, the Supreme Court decided *Rehaif*, overturning established Ninth Circuit
21 precedent. 139 S. Ct. 2191. In the past, the government was only required to prove that a defendant
22 knowingly possessed a firearm under 18 U.S.C. §§ 922(g) and 924(a)(2). *Id.* at 2200. Now, under
23 *Rehaif*, the government "must prove both that the defendant knew he possessed a firearm and that
24 he knew that he belonged to the relevant category of persons barred from possessing a firearm."
25 *Id.*

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1 **III. DISCUSSION**

2 Pham argues that by leaving out the new *Rehaif* element from the original indictment, this
 3 Court lacked jurisdiction. ECF No. 51, at 14. He further alleges the omission in the indictment
 4 violated both his Fifth Amendment guarantee that a grand jury find probable cause to support all
 5 the necessary elements of a crime, and his Sixth Amendment right to effective assistance of counsel
 6 and to be informed of the nature and cause of the accusation. *Id.* at 16–21.

7 **A. Unconditional Guilty Plea**

8 The government contends that by pleading guilty unconditionally, Pham waived his right
 9 to make any non-jurisdictional challenges to the indictment; specifically, his Fifth and Sixth
 10 Amendment challenges. *See Tollet v. Henderson*, 411 U.S. 258, 267 (1973). ECF No. 53, at 12.

11 As part of his plea, Pham waived “...all collateral challenges, including any claims under
 12 28 U.S.C. § 2255, to his conviction, sentence, and the procedure by which the Court adjudicated
 13 guilt and imposed sentence, except non-waivable claims of ineffective assistance of counsel.” ECF
 14 No. 39, at 11. Consequently waiving “all non-jurisdictional defenses...cures all antecedent
 15 constitutional defects, allowing only an attack on the voluntary and intelligent character of the
 16 plea.” *United States v. Brizan*, 709 F.3d 864, 866–67 (9th Cir. 2013). Considering the plea’s cut-
 17 and-dry language, the Court finds Pham’s claims are barred by his guilty plea even in view of the
 18 exceptions to *Tollett v. Henderson*, 411 U.S. 258 (1973).¹ Nevertheless, the Court still finds it
 19 necessary to address the jurisdictional and procedural default arguments below.

20 **B. Jurisdiction**

21 This Court “has jurisdiction of all crimes cognizable under the authority of the United
 22 States....” *Lamar v. United States*, 240 U.S. 60, 65 (1916). Any “objection that the indictment does
 23 not charge a crime against the United States goes only to the merits of the case,” and does not
 24 deprive the court of jurisdiction. *Id.*; *see also United States v. Cotton*, 535 U.S. 625, 630 (2000)

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 26 ¹ *Tollett* limited federal habeas challenges to pre-plea constitutional violations. 411 U.S. at 267. Exceptions to this
 27 general rule include a claim which the state cannot “constitutionally prosecute.” *Class v. U.S.*, 138 S. Ct. 789, 805
 28 (2018) (quoting *Menna v. New York*, 423 U.S. 61, 63 (1975) (per curiam)). While Pham claims such an exception
 exists in the present instance (ECF No. 51, at 21), the Court agrees with other well-reasoned decisions in the District
 of Nevada which hold it does not. *See United States v. Abundis*, Case No. 2:18-cr-00158-MMD-VCF-1 (D. Nev. Nov.
 30, 2020) (finding that the exceptions to *Tollett* do not apply under *Rehaif* as the claims “could have been remedied
 by a new indictment.”).

(reiterating *Lamar*). Quite importantly, the Ninth Circuit and decisions within the District of Nevada have relied on the principle announced in *Cotton* in cases considering the aftermath of *Rehaif*. See, e.g., *United States v. Espinoza*, 816 F. App'x 82, 84 (9th Cir. 2020) (“[T]he indictment's omission of the knowledge of status requirement did not deprive the district court of jurisdiction.”); see also *United States v. Miller*, Case No. 3:15-cr-00047-HDM-WGC (D. Nev. Dec. 8, 2020); *United States v. Baustamante*, Case No. 2:16-cr-00268-APG-CWH (D. Nev. Dec. 7, 2020).

Therefore, pursuant to Ninth Circuit precedent and decisions in this District, the Court had and continues to have jurisdiction over Pham’s case despite *Rehaif*.

C. Procedural Default

The government also argues that Pham’s claims are procedurally defaulted. ECF No. 53, at 6. While a defendant certainly can question the underlying legality of his sentence or conviction, one who does not on direct appeal is procedurally defaulted from doing so unless they can demonstrate: (1) cause and prejudice; or (2) actual innocence. See *Bousley v. U.S.*, 523 U.S. 614, 622 (1998) (citations omitted). “‘Cause’ is a legitimate excuse for the default; ‘prejudice’ is actual harm resulting from the alleged constitutional violation.” *Magby v. Wawrzaszek*, 741 F.2d 240, 244 (9th Cir. 1984).

Pham did not challenge the validity of the indictment and/or plea on direct appeal, but instead, argues his claims have not procedurally defaulted because he can demonstrate cause and prejudice, or, in the alternative, the omission in his indictment is a structural error and therefore only requires a showing of cause. Each argument is addressed in turn.

1. Cause

Pham can likely demonstrate cause. *Rehaif* overturned long standing precedent in the Ninth Circuit, and the decision’s constitutional consequences were not “reasonably available to counsel.” *Reed v. Ross*, 468 U.S. 1, 16 (1984).

2. Prejudice

Still, Pham cannot demonstrate prejudice. The Ninth Circuit has found in numerous scenarios, that even if a defendant had been aware that the Government would need to prove the

1 knowledge-of-status element, there is no reasonable probability that the outcome would have been
 2 different. *See United States v. Espinoza*, 816 F. App'x 82, 84 (9th Cir. 2020) (holding that “the
 3 failure of the indictment and plea colloquy to include the element of knowledge of felon status
 4 does not require us to vacate [the] conviction...”); *United States v. Schmidt*, 792 F. App'x 521,
 5 522 (9th Cir. 2020) (“Although [defendant] did not argue below that the government was required
 6 to prove [defendant] knew he was a felon, under any standard of review there was overwhelming
 7 evidence that [defendant] knew he was a felon when he possessed the firearms at issue in this
 8 case.”); *United States v. Tuan Ngoc Luong*, 965 F.3d 973, 989 (9th Cir. 2020) (finding in the trial
 9 context that, “even if the district court had instructed the jury on the knowledge-of-status element,
 10 there is no reasonable probability that the jury would have reached a different verdict...”). In other
 11 words, the Ninth Circuit has repeatedly found no actual harm resulted from alleged constitutional
 12 violations stemming from the decision in *Rehaif* in cases involving comparable facts to Pham’s

13 Here, Pham admitted to being a previously convicted felon at the time he possessed the
 14 weapon. ECF No. 39, at 3. In addition, Pham was on parole for attempted murder at the time of
 15 his arrest after serving nine years in prison. The Court is not persuaded the inclusion of the *Rehaif*
 16 element would have changed Pham’s decision to plead guilty or that his plea was involuntary. It
 17 seems clear Pham would have known he had been convicted of crimes for which he could be
 18 sentenced to more than a year imprisonment.

19 Accordingly, there is no reasonable probability, but for the *Rehaif* error, that the outcome
 20 of the proceeding would have been different. Therefore, because Pham has not demonstrated both
 21 cause and prejudice, he procedurally defaulted on his claims challenging the legality of his
 22 conviction.

23 **D. Structural Error**

24 Alternatively, Pham argues the constitutional errors are structural, therefore only requiring
 25 a showing of cause. “[C]ertain errors, termed structural errors, might affect substantial rights
 26 regardless of their actual impact on an appellant’s trial.” *United States v. Marcus*, 560 U.S. 258,
 27 263 (2010) (citations omitted). Structural errors go to the very heart of the trial and are not “simply
 28 an error in the trial process itself.” *Arizona v. Fulimante*, 499 U.S. 279, 310 (1991).

1 While the Ninth Circuit has not decided whether the knowledge-of-status element in *Rehaif*
 2 presents issues of structural error, numerous other circuits have concluded it does not. *See United*
 3 *States v. Nasir*, 2020 WL 7041357, at *19, n.30 (3d Cir. Dec. 1, 2020); *United States v. Coleman*,
 4 961 F.3d 1024, 1030 (8th Cir. 2020); *United States v. Payne*, 964 F.3d 652, 657 (7th Cir. 2020);
 5 *United States v. Lavalais*, 960 F.3d 180, 187 (5th Cir. 2020); *United States v. Trujillo*, 960 F.3d
 6 1196, 1207 (10th Cir. 2020).

7 The Court agrees with these circuit courts and concludes that *Rehaif* likely does not involve
 8 the limited class of errors the Supreme Court has deemed structural.

9 **E. Certificate of Appealability is Denied**

10 To proceed with an appeal of this Order, Pham must receive a certificate of appealability
 11 from the Court. 28 U.S.C. § 2253(c)(1); FED. R. APP. P. 22; 9TH CIR. R. 22-1; *Allen v. Ornoski*,
 12 435 F.3d 946, 950-951 (9th Cir. 2006). For the Court to grant a certificate of appealability, the
 13 petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. §
 14 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). And the petitioner bears the burden
 15 of demonstrating that the issues are debatable among reasonable jurists; that a court could resolve
 16 the issues differently; or that the issues are "adequate to deserve encouragement to proceed
 17 further." *Slack*, 529 U.S. at 483-84 (citation omitted).

18 As discussed above, Pham has failed to raise a meritorious challenge to his conviction and
 19 sentence pursuant to Ninth Circuit's decisions following *Rehaif*. As such, the Court finds that he
 20 has failed to demonstrate that reasonable jurists would find the Court's assessment of his claims
 21 debatable or wrong. *See Allen*, 435 F.3d at 950–51. Therefore, the Court denies Pham a certificate
 22 of appealability.

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1 **IV. CONCLUSION**

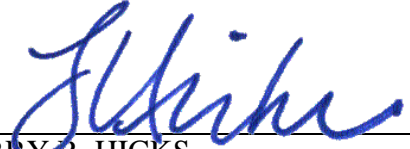
2 IT IS THEREFORE ORDERED that Pham's motion to vacate, set aside, or correct his
3 sentence pursuant to 28 U.S.C. § 2255 (ECF No. 51) is **DENIED**.

4 IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

5 IT IS FURTHER ORDERED that the Clerk of Court **ENTER** a separate and final
6 Judgment denying Pham's § 2255 motion. *See Kingsbury v. United States*, 900 F.3d 1147, 1150
7 (9th Cir. 2018).

8 IT IS SO ORDERED.

9 DATED this 6th day of January, 2021.

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12 LARRY R. HICKS
13 UNITED STATES DISTRICT JUDGE
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